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New Demands on Texas Prison Space Revive Debate over Correctional Strategies

The Texas prison system is again operating near capacity after a decade-long, \$2.3 billion expansion program that increased state correctional capacity to about 140,000 beds. The latest projections show that in April 1998 Texas will run out of prison space, and about 900 offenders will be backlogged in county jails awaiting transfer to state facilities. By August 1998, county jails will hold a projected 3,700 backlogged prisoners.

Texas has several options for dealing with an increase in demand for prison space. Some involve expanding the physical capacity of correctional facilities. Options identified by the Texas Department of Criminal Justice include expanding facilities during this interim. Other options would modify state policies on incarceration.

Some proposals would require full legislative approval and could not be initiated until the next session; others could occur within the context of current law. For example, state agency appropriations may be changed when the Legislature is not in session through the budget execution authority wielded by the governor acting in tandem with the Legislative Budget Board. Under Chapter 317 of the Government Code, budget execution authority may be used to prohibit an agency from spending funds, change the purpose for an appropriation, change the time that an appropriation is distributed to an agency, or transfer an appropriation from one state agency to another.

This report analyzes options available to Texas in dealing with another surge in demand for prison beds. At issue are questions of public safety and cost. What would be the costs of expanding the prison system and are taxpayers willing to assume those expenses? Should the state build additional prison beds or look to the county jails for correctional space? Could changes in current parole and probation policies provide acceptable, economical alternatives to incarceration?

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Demands on Prison Capacity

The number of inmates serving and sentenced to serve time in a Texas state correctional facility will outstrip capacity by April 1998, barring any policy changes or new construction authorizations, according to the state Criminal Justice Policy Council (CJPC). The council is charged with developing criminal justice statistics and is the primary source for correctional bed demand projections used by the Legislature.

By the end of November 1997, demand for prison beds will exceed the total operational capacity in the Texas Department of Criminal Justice (TDCJ) by about 2,000 beds, according to a September 1997 report by the council. (CJPC assumes operational capacity at 97.5 percent of total capacity. The reserved portion of total capacity allows TDCJ flexibility to move prisoners and comply with restrictions on housing certain types of inmates together.) CJPC reports that the difference between demand and capacity can be accommodated by temporarily housing new inmates in county jails, in accordance with state laws that allow for keeping offenders in county jails for up to 45 days after all processing is completed for their transfer to state facilities.

With county jails providing the safety valve by holding offenders for the allowed 45-day window, CJPC projects capacity will keep pace with demand through 1997 and into early 1998. In December 1997, Texas will begin using two new state jail facilities that were built in 1995 but not opened due to low demand at the time. With these facilities on line, prison system capacity will increase to 141,177 beds, close to the December 1997 estimated demand of 143,455. But by April 1998, according to projections, about 5,500 offenders will be housed in county jails after sentencing, with over 900 of these backlogged in the jails past the 45-day limit.

The dual problems of increasing demand and backlogged prisoners in county jails are projected to continue, even with the opening in August 1999 of two high-security units authorized by the 75th Legislature. By August 2000, projections show, about 5,700 prisoners will be backlogged in county jails past the 45-day limit awaiting transfer to state facilities, and about 3,500 offenders will be legally housed in county jails within the 45-day limit. By August 2001, the demand for prison beds could fall slightly, to 150,837, as Texas begins to feel the impact of long-term changes in criminal justice policies affecting both juveniles and adults, according to CJPC forecasts.

Prior Prison System Expansions

Impetus for expansion. Beginning in 1985, demand for prison beds in Texas began outstripping supply. At that time, state correctional capacity totaled some 40,000 beds. Reasons for the growth in demand in the last decade are many, including: a burgeoning state population; more punitive policies toward offenders, especially for violent crimes; tighter restrictions on parole, including longer minimum periods behind bars before parole eligibility and tougher policies for granting time off sentences for good conduct; and a stepped-up "war on drugs."

TDCJ Capacity and Population Projections*

	TDCJ operational capacity	TDCJ demand population	TDCJ "duty to accept" population**	45-day transitional population in county jail
October 1997	140,105	142,211	0	2,107
April 1998	141,177	146,717	927	4,613
August 1998	141,177	149,489	3,714	4,598
August 1999	142,464	151,484	5,210	3,810
August 2000	142,464	151,713	5,718	3,531
August 2001	142,464	150,387	4,975	3,398

* Assuming no change in number or size of facilities.

** The number of convicts in county jails waiting transfer to state facilities beyond the 45-day limit.

Source: Criminal Justice Policy Council, *Projection of Adult Correctional Population and Capacity, FY 1998 to FY 2002*, September 9, 1997.

In addition, the supply of prison space was affected by housing restrictions imposed as part of the *Ruiz v. Estelle* lawsuit. In a memorandum opinion issued as part of *Ruiz*, U.S. District Judge William Wayne Justice of Tyler ruled that living conditions in the Texas prison system constituted cruel and unusual punishment in violation of the U.S. Constitution (Civil Action No. H-78-987-CA). The final judgment in *Ruiz*, signed in December 1992 following 20 years of litigation, established inmate housing requirements that include space and support service criteria.

In 1991 the Legislature enacted statutes that codified within the Government Code (secs 499.101 to 499.109) limits on the maximum capacity of prison facilities as well as a procedure for determining the maximum capacity of new units and changing the established capacity of other units. The code (secs. 501.111 to 501.113) also restricts use of temporary housing for inmates and prohibits triple-celling of inmates and mixing inmates with different security and housing classifications.

In 1991, lawmakers also enacted a 45-day deadline, to take effect September 1, 1995, for moving prisoners from county jails to state facilities once they have been sentenced to a state facility and all processing for the transfer has been completed. Texas had delayed transferring from county jails a growing number of convicted felons in order to avoid exceeding state prison capacity limits. By April 1994 the backlog in county jails had reached a peak of about 30,000 prisoners, and many county jails were severely overcrowded. However, the state cleared out the backlog of inmates and housed all “duty-to-accept” inmates within the 45-day limit by the September 1995 deadline.

During the overcrowding several counties sued the state, and Texas was ordered by the courts to pay counties almost \$20 million in fines. The state also spent another \$681 million in payments to counties and other costs for emergency housing during the overcrowding.

Expansion efforts. To meet the growing demand for prison beds, Texas embarked on a building program financed primarily by general obligation bonds. From 1987 to 1993, the Legislature proposed and voters approved four amendments to the Texas Constitution authorizing general obligation bonds

worth a total of \$3 billion. Some \$2.3 billion of this amount went to TDCJ to build about 101,000 prison beds. Over the last decade, Texas also has used other methods of financing — including certificates of participation and revenue bonds in conjunction with lease purchase agreements — to build about 9,800 correctional beds costing some \$217.4 million in principal.

Legislative appropriations to build correctional beds are based on estimates of the number to be built, but the specific number of beds actually built may differ from the estimate. TDCJ can stretch construction dollars by securing lower prices on goods or services or by modifying plans to put two inmates instead of one in a cell. Conversely, the number of beds built with an appropriation can be less than estimated if, for example, costs are higher than anticipated or cells planned for two inmates are changed to house a single hard-to-manage inmate. Capacity also may be reduced if facilities are transferred to another state agency, such as the Texas Youth Commission.

In 1995, using the bond money approved earlier by the voters, the 74th Legislature made two appropriations to TDCJ for additional prison capacity: a \$236.4 million emergency appropriation to build about 14,000 emergency beds and to add 667 beds to a state jail and a \$250 million appropriation to build additional facilities, including high-security units, holding a total of 8,000 beds.

The emergency and state jail bed projects were completed and work began on one 660-bed high-security unit. However, in 1996 further construction funded by the second appropriation was put on hold after projections showed that the demand for prison beds would not be as great as anticipated.

In the spring of 1997, the 75th Legislature authorized TDCJ to move forward with constructing two high-security units originally authorized by the 74th Legislature. With this authorization, all but \$125.7 million of the \$250 million appropriated during the 74th session has been identified by the Legislature for a specific purpose. According to spring 1997 projections, this construction would give TDCJ sufficient capacity through late 1999. Subsequently, however, new analyses of developing trends showed a different picture; CJPC now is projecting a shortage of state beds as early as April 1998.

Incarceration Facilities and Costs in Texas

State correctional capacity is divided among many different types of facilities. However, the bulk of capacity is made up of:

- *prisons*, housing persons convicted of first-, second- and third-degree felonies;
- *transfer facilities*, used to house felons who have been moved from county jails but for whom the state does not have room in a prison; and
- *state jails*, for persons convicted of state jail felonies.

The state correctional population numbered approximately 140,000 persons as of October 1997. About 65 percent of the total are housed in prisons, about 22 percent in transfer facilities, and about 5 percent in state jails. The remaining 8 percent are housed in other facilities, including geriatric units, psychiatric units, boot camps, and substance abuse treatment facilities.

Prison inmates are classified according to their security risk, and the different classifications are housed in different types of facilities. In general, minimum security inmates are housed two to a cell or in dormitories. Medium security inmates are housed two to a cell. Close custody inmates are housed two to a cell but are separated from other inmates and subject to some restrictions. Inmates under “administrative segregation” are isolated one to a cell and kept locked up for about 23 hours a day.

About 4,060 of the state’s prison beds and 7,700 of its state jail beds are operated by private companies. Privately operated facilities housing Texas prison inmates are overseen by TDCJ and must comply with Government Code (sec. 495) requirements, including adherence to the standards of the American Correctional Association. The Government Code caps the number of private *prison* — but not state jail — beds at 4,080. Private facilities may house only minimum or medium security inmates. In addition, they must offer programs that are at least equal to those provided by state-operated facilities and at a cost that is at least 10 percent lower than what could be provided by the state. Privately operated *county* jails, some of which have come under scrutiny recently for alleged prisoner abuses, are not overseen by TDCJ.

The Criminal Justice Policy Council has calculated that the average cost per day, excluding construction costs, to house an inmate in a state prison was \$39.51 in fiscal 1996. Costs varied from about \$34 to \$54 a day, depending on the category of inmate and the type and age of a facility. TDCJ has estimated that, excluding one-time start-up expenses, building and operating new facilities to handle the increasing demand for space would cost \$31.47 per day per inmate for beds added to a trusty camp, \$38.44 for cells added to a high-security unit and used to double-cell inmates, and \$47.50 for cells added to a high-security unit and used to both single-cell and double-cell inmates. Costs to build and operate new facilities would be lower, in some cases, than the system-wide average calculated for fiscal 1996 because newer units would be more efficient. The earlier average also factored in costs for a wide range of facilities.

Contracts to house out-of-state offenders in county jails averaged about \$40.00 per day per inmate as of September 1997, according to the Texas Commission on Jail Standards. The average cost to counties to house prisoners is about \$33.55 per prisoner per day.

Factors Fueling Demand

Many factors contribute to the demand for correctional beds. They include the crime rate, types of criminal sentences prescribed by the Legislature and imposed by the courts, rates of parole and probation, and rates of parole and probation revocation.

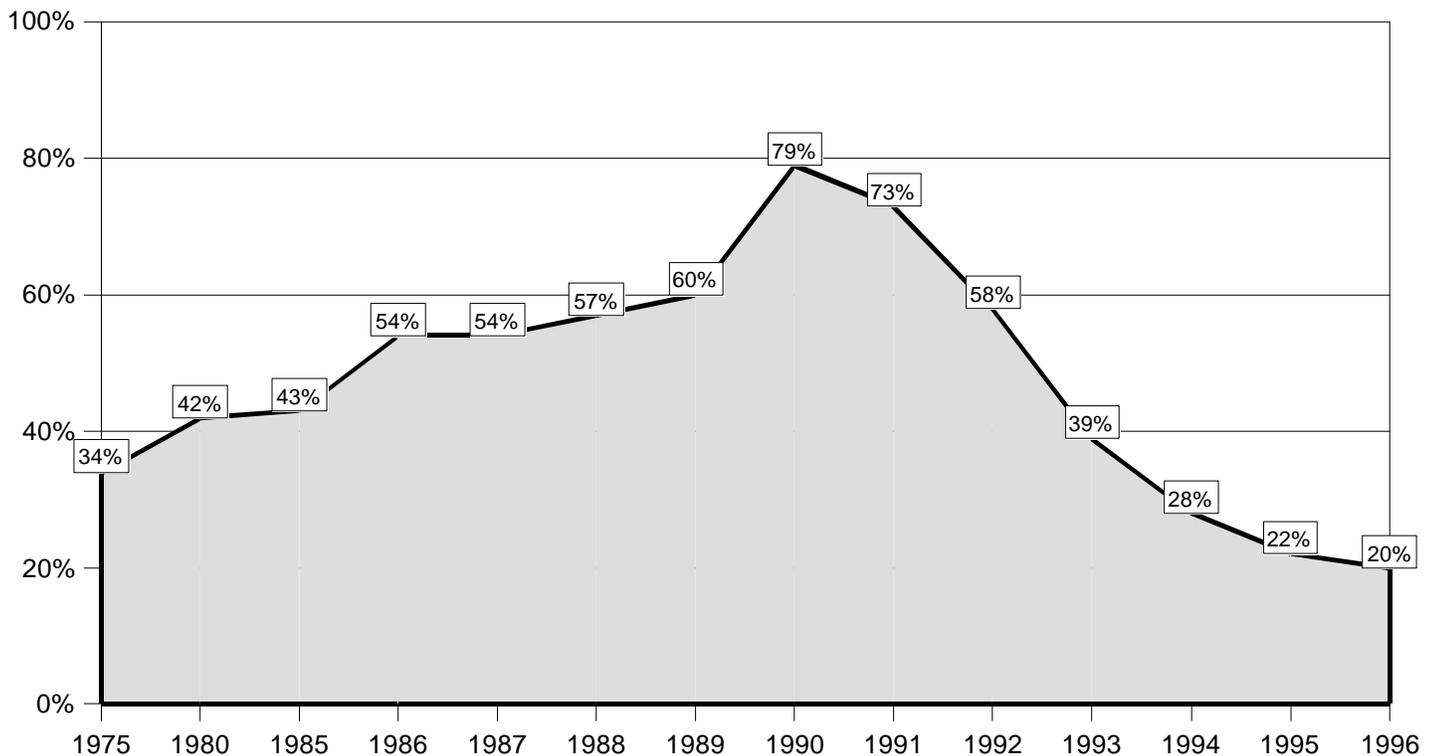
In its September 1997 report, the CJPC stated that current growth in demand for prison beds has resulted not so much from increases in population or crime rates as from tougher parole release and parole revocation policies instituted by the Board of Pardons and Paroles. The parole board — an 18-member body whose members are appointed by the governor — may vote to release qualifying offenders from prison before they have completely served their sentences. Paroled prisoners serve the remaining portion of their sentences under supervision of state parole officers.

Parole approval rates — the portion of inmates released on parole relative to the total number of inmates eligible and considered for parole — have dropped over the last several years. As the rate drops, the demand on prison beds increases because inmates will stay in prison longer.

In fiscal 1990, near the height of the prison overcrowding crisis, the overall parole approval rate peaked at 79 percent. Since then, the overall parole approval rate has declined steadily, dropping to about 20 percent for fiscal 1996. The average rate has continued to decline and stood at 15 percent for June 1997.

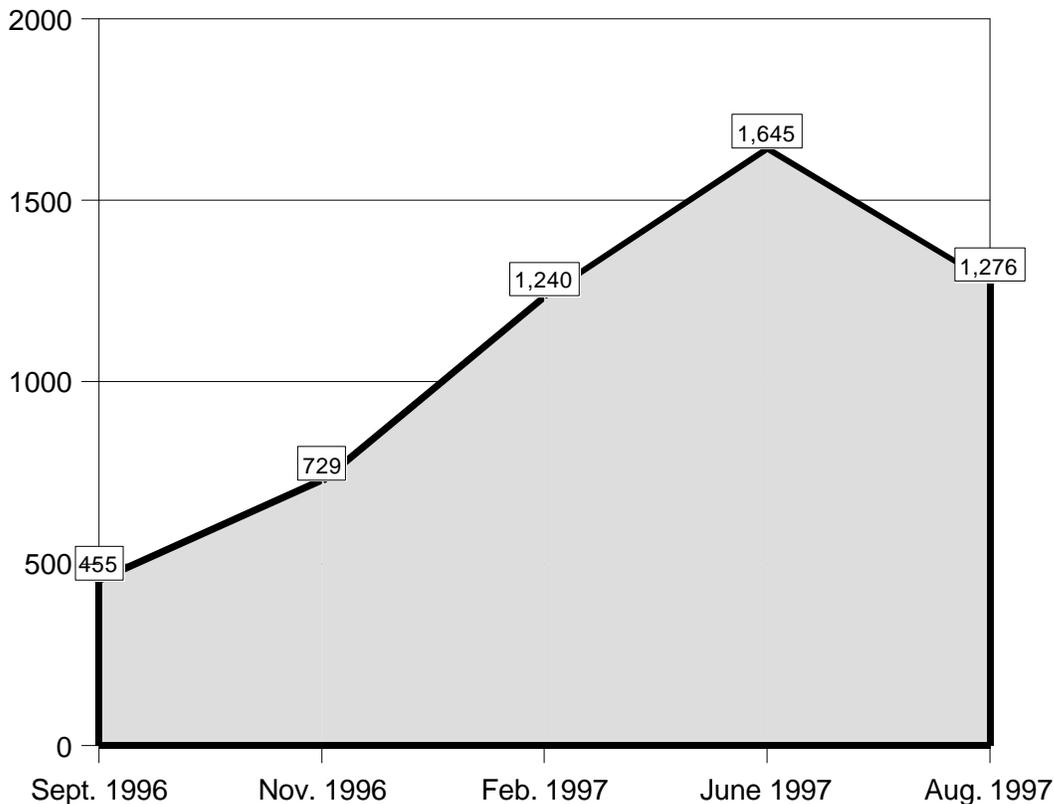
Parole rates for specific offenses continue to vary greatly. In June 1997, the rates varied from zero percent for aggravated sex offenders to 20 percent for nonviolent offenders.

Parole Approval Rates



Source: Texas Department of Criminal Justice

Monthly Trends in Parole Revocation



Sources: Criminal Justice Policy Council, Texas Department of Criminal Justice

The trend toward declining parole approval rates has been accompanied by a upswing in the number of parole revocations issued by the parole board. Parole revocation returns the offender to prison to serve out the remainder of the sentence.

Options for Meeting Demand

Texas has two main categories of options for dealing with the demand for prison space. One set involves facilities options, i.e., expanding the number or types of facilities used to confine inmates by, for example, building more prisons, leasing correctional beds from county jails, or increasing the use of private prisons.

The other set of options involves policy strategies designed to curb demand on facilities. These could include expanding use of parole and increasing fund-

ing for alternatives to incarceration. This category also includes efforts to remove remaining vestiges of federal control over Texas prison management.

Facilities options

- **Build more correctional facilities.**

Supporters say: Additional expansion of the state's prison capacity is necessary to meet the growing demand for prison beds. Texas must have more prison beds in order to make sure violent offenders serve greater portions of their sentences and to lock up offenders who violate their parole or probation. Expanding prison capacity means that the worst offenders can spend more time behind bars. Lack of adequate prison capacity both impedes law enforcement efforts and undermines the deterrent effect of prison on criminal activity.

The state has a responsibility to provide adequate facilities for housing criminal offenders. Adequate prison capacity is necessary to deal with the results of statutes enacted in recent years requiring longer minimum stays before parole eligibility, curtailing the use of time off for good conduct, and restricting the automatic release of offenders under mandatory supervision before their sentences are served.

Delaying construction of needed facilities could result in another jail overcrowding crisis. If state inmates become backlogged in county facilities after the 45-day deadline, Texas risks a number of adverse consequences, from reactivation of the old overcrowding lawsuits to assessment of fines. While the statute does not impose a penalty for violations, lawsuits against the state could be reopened, and Texas could be ordered to make additional payments to counties if it once more began exceeding the 45-day limit. At the very least, the state would have to pay counties to house offenders.

Underlying these scenarios is a real need for additional capacity to house the most hardened inmates. Private facilities and county jails cannot offer the high-security housing these inmates require. The number of assaultive and violent inmates who need to be housed one to a cell in "administrative segregation" has grown by over 1,000 to almost 7,700 in the two years ending August 1997. In addition, the rate of assaults on TDCJ staff by offenders has steadily increased in the last few years, from 3.1 per 10,000 inmates per month in 1994 to 8.2 per month for the first half of 1997. The rate of assaults by inmates on other inmates also has increased, from 6.4 per month per 10,000 inmates in 1994 to 9.2 per month three years later.

Additional capacity would be cheaper to build now rather than later, when construction costs are sure to be higher. Although building beds can be more expensive than leasing space in the short term, in the long term building and owning a facility would be more economical than leasing space from either a private facility or a county.

Some expansion of state correctional facilities can be done now. In September 1997, TDCJ identified expansion options, including a \$143.3 million construction plan that would build about 5,440 correctional beds. The bulk of the construction would be paid for with \$125.7 million in unused bond funds

originally appropriated to the department in 1995. The additional \$17 million could come from other unused bonds or surplus revenue. The proposed plan would include fast-track construction to expand 20 existing trustee camps with dormitories, adding about 2,140 beds in about a year. Additions to three high-security facilities would add about 3,300 beds. If state officials directed TDCJ to proceed with this interim construction plan, the 76th Legislature could address further facilities needs free of any immediate emergency.

Opponents say: Texas should not continue trying to build its way out of its prison capacity problem. The state needs to break its expensive prison-building habit because no amount of construction will ever meet the potential demand for prison space. As the last few years have shown, the number of offenders sentenced to prison, held in prison rather than released on parole, or reincarcerated following revocation of parole or probation will expand to fill the number of prison beds available. As the prison system grows ever larger it becomes more difficult to manage. For example, some question whether the system has expanded so rapidly that it cannot keep up with inmates' health care needs.

Money now poured into prison construction would be better used to divert nonviolent offenders from prisons into alternative facilities and alternative methods of supervision and to shore up rehabilitation programs. Another option would be to spend prison construction funds on programs to treat the root causes of crime. Building prisons is a short-term approach to a problem that can only be ameliorated through long-term changes in public policy and social programs.

Building and operating additional prison facilities would siphon money from other pressing state needs, such as long-term community care for the aged and disabled and local juvenile justice programs. Criminal justice has experienced the fastest expenditure and employment growth of any function of state government, but Texas cannot continue to funnel money to this area. Operating costs for new prison facilities are not insubstantial. Every facility built today carries with it the need for millions of dollars per year in operating funds. For example, a standard 2,250-bed maximum-security facility costs about \$31 million a year to operate. In addition to money borrowed to build correctional facilities, the state would

have to pay interest on the debt, which can sometimes double the cost of building a facility.

- **Lease jail beds from counties.**

Supporters say: Instead of building new prisons to meet the demand for correctional beds, Texas should lease jail space from its counties, many of which have empty beds that were built in the last decade to handle backlogged state prisoners. Leasing jail beds from counties would be the best use of taxpayer dollars, saving state construction funds and preventing additional state debt while simultaneously helping counties meet their financial obligations. By leasing space from the counties, Texas could avoid committing resources to building new prison beds until long-term needs became clearer.

Texas would probably have to pay about \$35 to \$45 per day per inmate to lease county jail beds, amounts close to the system-wide average cost of \$39.51 per day to house an inmate in a state facility in fiscal 1996 and close to the cost estimated by TDCJ to construct and operate new facilities.

TDCJ could make use now of county jail beds under authority granted it under Government Code sec. 143.010 to enter into leases with public or private jails for temporary or permanent housing. Because of this authority, contracts with counties that operate their own jails or that contract with a private company to operate their jails would not fall under other Government Code provisions that cap the number of inmates TDCJ may house in privately operated prisons.

This scenario also would avoid the lag time necessary to construct facilities or the controversies that may accompany siting decisions. According to estimates, at least 5,300 and as many as 10,000 county jail beds could be available for state lease through 1998, assuming that mothballed beds are returned to service and that jail construction proceeds as planned. Even more beds could be available if all jails were operated at 100 percent capacity. And about another 4,500 beds could be used if out-of-state inmates were returned to their home states.

Projections show that by April 1998 about 900 prisoners will be backlogged in county jails beyond the 45-day time limit. Even if a construction program were started immediately, the new beds would not be

ready for almost a year. In the meantime, the state should take advantage of the available beds in county jails to ensure that prisoners do not become backlogged in county jails in violation of the statutory 45-day deadline. Furthermore, a long-term policy of leasing some jail space from counties would allow Texas to undertake only a moderate building program since it is unclear how many beds will be needed in five or 10 years.

But the state should negotiate with the counties as soon as possible if it is going to lease county jail beds. Early negotiations would both secure use of the beds for the state and enable the counties to make long-range plans.

Many counties need a source of income to pay the construction debt and operating costs associated with their empty jail beds. Several counties, unsure of when Texas would remove backlogged prisoners from their jails, expanded facilities to alleviate the overcrowding crisis. Now the state should help them by keeping their beds operational and their trained correctional staff employed. This way, the counties will be prepared if state facilities again become full and state inmates again are backlogged in county jails.

While some counties have rented out their excess jail space to other states, most would rather house Texas inmates. Texas county jailors are more familiar with Texas laws and the rights and requirements involved with housing Texas offenders, and prisoners are often better behaved in their home state.

Using county jail beds would be good correctional policy. Offenders would be in their communities, close to family, friends and potential employers, circumstances that would help with the process of social reintegration. For example, many county jails offer successful job skills and other programs.

Concerns that county jail beds are not sufficiently secure to house prisoners sentenced to state prisons are unfounded. These same prisoners are kept in county jails during trial and sentencing and while awaiting transfer to state facilities. In addition, county jails adequately housed tens of thousands of state inmates in the last decade when state facilities were full.

The requirements of the *Ruiz* settlement regarding minimum standards for prison facilities should not be

an issue for the state in leasing county jail space. In the past, *Ruiz* requirements have not extended to county jails. Alternatively, leased county jails could be classified as transfer facilities, which traditionally have not been subject to *Ruiz* requirements.

Beds could be leased from the counties in large blocks, making oversight easier. As of September 1997, about 15 jails had more than 100 beds available. Even where few beds were available, the state could simply pay counties to keep prisoners from their communities instead of transferring them to a state facility.

Housing a few thousand inmates in county jails would not result in a dramatic change in the makeup of TDCJ's population. The state would be able to retain both minimum and maximum security inmates and would have enough inmates to work in prison factories and at the various jobs, such as cooking and cleaning, that help the system operate.

Opponents say: Good fiscal policy would argue against leasing beds for offenders in the face of a long-term need for additional correctional space. Texas would do better to spend money now on building additional beds rather than renting correctional space from counties and building beds later. Construction costs will only increase in the future; the state should begin addressing its long-term capacity needs without delay.

The state is not obligated to help counties pay off debts they freely incurred to build their jail facilities, especially since the counties knew full well of the prison construction program and the state's intention to remove its prisoners from county facilities. With a large-scale leasing program, counties could come to rely on state funds as an entitlement.

Leasing costs are uncertain and may not really represent a savings over the cost of building and operating state facilities. Excluding one-time start-up expenses, TDCJ estimates the cost of building and operating new correctional beds at \$31.47 per day per inmate for beds added to a trusty camp, \$38.44 for cells added to a high-security unit and used to double-cell inmates, and \$47.50 for cells added to a high-security unit and used to both single-cell and double-cell inmates. The average cost per day to lease a county jail cell was about \$40 per inmate in

September 1997, and counties may well demand a higher fee to house the state's harder to manage inmates.

Furthermore, leasing beds from counties would involve costs to the state over and above the estimated contract rate. The state would have to pay for medical care for inmates, which could run about \$5 per day per inmate, and would incur extra expenses in monitoring and overseeing state inmates in county facilities. A number of the beds are in facilities with fewer than 50 available beds. If state inmates were spread throughout numerous small facilities, the task of monitoring county jails could prove to be difficult and inefficient.

Leasing beds from counties could raise the issue of whether the jails would have to comply with requirements for leased or acquired facilities established by the final judgment in the *Ruiz* lawsuit. Although county jails did not have to meet *Ruiz* requirements when they held backlogged state inmates, they could be held to a different standard if Texas deliberately contracted with them to hold state inmates. Some of the available jail beds could be unusable if they were required to meet *Ruiz* prison standards or if they were held to standards in the *Ruiz* judgment for acquired or contracted facilities.

Statistics citing available county jail beds could be misleading. The number of available beds is difficult to project because of uncertain growth in county jail populations and county jail construction. In addition, some of the so-called "available" beds are mothballed beds that could require renovations before being used.

Security arrangements in county jails may be inadequate for the harder to handle state inmates who must be housed in secure cells rather than the dormitories sometimes found in county facilities. In addition, county jail beds have been built to hold inmates for short terms rather than long prison sentences, a problem if inmates became difficult to manage because they thought they were being denied the programs and amenities found in a TDCJ facility. State facilities have education, job skills, and other programs that often are not offered by county jails.

Other opponents say: Before leasing beds from counties, the state should carefully analyze its offender housing needs. A population primarily

composed of the harder to manage, violent inmates needing secure prison cells would be ill served by county jails providing only light-security space. The state could find itself sending to county jails the more easily managed and cheaper to house inmates who do factory and other TDCJ work while keeping the more violent inmates who are costlier to house and guard. This scenario could raise prison operating costs for the state while making the system more violent and dangerous for workers and inmates alike.

In addition, the state should be wary of becoming dependent on leasing correctional beds from counties. If leasing allowed counties to gain too much control over the market, the state would be in an undesirable position when negotiating leases.

- **Expand contracts with private prisons.**

Supporters say: By increasing use of private prisons, Texas could expand its correctional capacity without undertaking construction costs. Currently about 4,060 prison beds and 7,700 state jail beds are operated by private companies. While the number of inmates who can be housed in private prisons now is capped at 4,080, the statute could be changed by the Legislature.

Using private operators would be efficient because the state could pay for facilities as it needed them. The state would only have to provide oversight of the facilities, while the private companies would have to construct the buildings and hire and train staff. With a prison population of over 140,000, the state needs beds for all types of inmates, including the minimum and medium security inmates who can legally be housed in private facilities.

Opponents say: Additional correctional capacity should be met with public rather than private facilities. Public safety is a fundamental responsibility of the state and should not be delegated to private entities. Texas must be sure it has adequate public facilities to enforce state law.

Private prisons are not a silver bullet solution for the state's imminent capacity problems. Because Texas, with about 4,060 private prison beds, is close to the Government Code cap of 4,080 private beds, legislation would be necessary to expand the practice. New private facilities for state use could not be built any faster than the state could build them itself. And

although Texas would not incur direct construction costs, a private facility would surely recoup those expenses in the price it charged the state.

Private prisons may not meet state needs because they are limited by current law to housing only minimum and medium security inmates. The big need in Texas is housing for maximum security inmates.

Furthermore, Texas should be wary of becoming dependent on private facilities that could gain too much control over the market for correctional beds, placing the state in an undesirable position when negotiating leases.

Policy options

- **Increase use of parole and alternatives to incarceration.**

Supporters say: Texas could lessen the need for correctional facilities by diverting from prison many nonviolent offenders, using instead such alternatives as intensive probation supervision, boot camps, restitution centers, electronic monitoring, and early intervention programs. Many of these programs can cost substantially less than incarceration. More importantly, they have been proven effective. In 1993 through 1995, the state funded successful community corrections programs in Harris County to divert offenders from prison. While these programs were considered successful by many observers, a lack of monitoring has made their results difficult to quantify, generating criticism by others that they were not effective. In addition, long-term analysis of this tactic was hampered when diversion programs were curtailed in the face of available state prison space.

If judicial reluctance to use alternatives to incarceration or public dislike of these options has been a problem in the past, educational programs could be undertaken to show that such programs can be useful correctional tools that carry a smaller price tag than building prisons and that lead to lower recidivism rates among offenders.

Demand for state correctional beds also could be alleviated by increasing the use of parole for those offenders who can safely be released into the community to finish their sentences. The parole rate currently stands at about 15 percent, a sharp drop

from the record 79 percent rate reached during the prison overcrowding crisis of the late 1980s and early 1990s. Some critics say that parole board decisions to deny the large majority of parole applications reflect politically advantageous, get tough on crime sentiments rather than sound correctional decision-making. Although the Legislature does not have a direct role in parole decisions, it could influence policy in this area by requiring, for example, that the parole board develop more flexible guidelines allowing for a more reasonable rate of parole somewhere between the wide extremes of the last 10 years.

Another option would be to change the parole revocation process so that offenders are sent back to prison only for parole violations involving a new criminal offense. Of the approximately 12,000 parole revocations made from September 1996 through August 1997, about 14 percent — some 1,700 — were for parole violations that did not involve a new criminal offense. If these parolees had not been returned to prison for technical violations — such as failing to report to their parole office or pay a court-ordered fee — more space would have been available for other offenders.

Opponents say: Alternatives to incarceration have not been entirely successful in the past. Historically courts have not used the available alternatives to incarceration, and the public increasingly has demanded that their elected officials — including judges — present a tough stance on crime by locking up offenders. Even if the Legislature encouraged courts to use alternatives to incarceration, judges still would have discretion to impose prison sentences on offenders, whom the state must be ready to house. When the state funded these types of programs in Harris County in the early and mid 1990s, no major impact was seen on the population of offenders sent to prison from the area. In addition, numerous questions still circulate about whether the funds were properly and wisely spent for the diversion program.

State prison capacity, likewise, should not dictate decisions about parole. The parole board should retain exclusive authority for determining why and how prisoners should be released on parole or when their paroles should be revoked. Any legislative attempt to influence parole or parole revocation decisions made by the constitutionally established parole board would be inappropriate.

- **Remove restrictions imposed by *Ruiz*.**

Supporters say: The state could increase the number of prison beds available if federal district court control over Texas prisons were terminated. The terms of the final judgment in the *Ruiz* prison lawsuit, signed in 1992, limited the population of individual prison units and established other restrictions on inmate housing. Some facilities could house more prisoners and still pass constitutional muster, given their support services and management expertise, but beds are left empty or unnecessary and inefficient housing configurations are used solely to avoid exceeding the limits and violating the restrictions in the *Ruiz* judgment.

Terminating the *Ruiz* suit would eliminate these housing restrictions and make possible different housing configurations, based on the state's own Government Code guidelines for capacity. Without federal court oversight, Texas would continue to run a constitutional prison system that would comply with state laws but that would not be subject to the unreasonable inmate housing restrictions in the *Ruiz* judgment. The state, not the federal government, should have unfettered authority over the Texas prison system.

While it is unclear how many beds would be gained by ending federal oversight, an April 1994 Texas Performance Review study of prison capacity conservatively estimated that 5,500 beds could be added to the prison system if the state were not bound by the terms of the *Ruiz* final judgment. Conceivably, even more beds could be gained through other management changes currently prohibited under *Ruiz*.

Attempts to end federal court oversight have proceeded along two paths — one initiated by the Office of the Attorney General (OAG) and the other by Rep. John Culberson and Sen. Buster Brown. The OAG filed a motion in federal district court in September 1996 requesting termination of federal oversight on the grounds that the federal Prison Litigation Reform Act limited the authority of federal courts to intervene and to continue oversight over state prisons. When the district court deferred ruling on the motion, citing the need for a hearing, the OAG appealed to the 5th U.S. Circuit Court of Appeals in New Orleans. Because the deferral was not a final ruling, the appeals court denied the motion

and returned the issue to the district court, where it is still pending.

Claiming that the OAG has done an inadequate job of pushing for termination of federal oversight, Rep. Culberson and Sen. Brown also have filed motions to intervene in the *Ruiz* lawsuit and to terminate the suit. No rulings have yet been issued, and questions have been raised about whether they have standing to intervene in the proceedings.

Opponents say: Even in the absence of *Ruiz*, the state still has a duty to run a constitutional prison system. There are no empty beds in prisons that can be used to *constitutionally* house inmates. Both the final judgment in the *Ruiz* lawsuit and state law allow Texas to use 100 percent of the prison system's capacity to house inmates in a constitutional manner. Constitutional capacity may differ from other measures of capacity, thus explaining why some beds or spaces may be empty. For example, while a facility may have been modified to provide beds for an increased number of inmates, fewer inmates may be housed there because of the facility's support services, such as kitchen, laundry and wastewater treatment services. By some measures, such as design capacity, some Texas facilities operate at over 100

percent of capacity in that they house more inmates than planned for in the original designs.

Texas prisons are currently being used to the fullest extent allowed by law. Beds would not automatically become available if the *Ruiz* judgment were terminated; empty beds or spaces that may exist now could not all be legally used for inmates. In most cases, the state could legally add capacity to existing prison units only by constructing additional housing and ensuring that support services were adequate for all inmates. In many of these cases, the cost of upgrading the support functions necessary to maintain added capacity would be prohibitive. Costs could be especially steep in older prison units, where construction is more difficult due to aging infrastructure and unique architecture.

Vacating the *Ruiz* lawsuit could be a losing proposition for the state because it could result in increased scrutiny of the prison system by the court while it decided whether or not to terminate the suit. The judgment clearly defines what is considered adequate services and system operations; absent those definitions, Texas could be subject to other lawsuits.

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